No. 87-1022

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, *et al.*,

Appellants,

v.

BEVERLY MORRIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATEN ISLAND LEAGUE FOR BETTER GOVERNMENT AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Brief for The Staten Island League for Better Government as Amicus Curiae in Support of Appellants

INTEREST OF THE AMICUS CURIAE

The Staten Island League For Better Government ("The League"), a non–profit civic and community organization in existence for nearly forty years, is deeply troubled and concerned about the political, social and economic consequences of the decisions of the courts below. To make known its views to this Honorable Court, The League is filing this *amicus curiae* brief, with the consent of all parties.

PRELIMINARY STATEMENT

"*Why* are we bombing this village? — *WHY* are we bombing this village? That's a silly question. We are bombing this village to save it naturally."

Today, the perversity of this Vietnam War era observation is obvious. It was not always so. Some things take time.

Regarding the New York City Board of Estimate, a governing body to which there is: (1) no grass roots opposition, (2) no political movement to abort, and (3) no clamor from the streets to disband, one may well ask:

> "Why are we bombing this democratically born and democratically sanctioned institution – to which there is no democratic opposition?"

To which the plaintiffs in this case answer:

> "Why to save democracy, of course."

ARGUMENT

I. COURTS SHOULD AVOID INTERFERENCE WITH LOCAL INDIVIDUALS AND LOCAL INTEREST GROUPS AND ALLOW THEM TO DETERMINE THEIR OWN FORM OF LOCAL GOVERNMENT.

Court interference with local government should be the exception and not the rule. Courts should not force local governments to restructure themselves except in the most extreme cases.

This is a wise policy. It allows local governmental experiments and locally formed solutions to local problems. *See infra* pp.6–7. The resulting diversity promotes: (1) lively citizen input, (2) activist voters, and (3) government responses that WORK.

In such a system, people feel that they can make a difference. They feel that they "count." They feel they have some control over their communities, cities and towns.

Judicial control of local government, on the other hand, is ultimately counterproductive. It promotes citizen laziness, unresponsiveness, and a feeling that local individuals and interest groups "can't make a difference."

For these reasons, as a matter of public policy, The Staten Island League for Better Government is against judicial control over local government formation, especially where, as here, the claimed constitutional infirmity represents a "close call." In such cases the benefit of the doubt should be given to local individuals, so that local sovereignty and a true separation of powers may flourish.

At the very least, this case was a "close call." This is especially so since no public hearing was held and the facts were not fully developed because there was no trial. In such a case, the lower courts should have resisted the temptation to exercise their power. They should have allowed federalism to work.

II. ASSUMING THE PROPRIETY OF FEDERAL JUDICIAL OVERSIGHT, THAT STILL DOES NOT MEAN THAT COURTS SHOULD MICRO MANAGE LOCAL GOVERNMENT.

The micro manager wants to control everything. Put a micro manager in charge of a courthouse, and he will not only want to dispense paper clips, he will want to write the court decisions as well.

This kind of control is excessive. It is counterproductive. It is not the type of control a court should have over local governmental institutions.

To avoid this, courts should bend over backwards to make complete factual findings before they issue deadlines and ultimatums to local governments.

That did not happen here. Here, the lower courts instructed New York City to reformulate government for over seven million people, *without so much as a trial*!

This was wrong. *See, e.g., Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426, 434 (1948) ("Judgment on issues of public moment based [only] on [affidavit] evidence ... is apt to be treacherous."); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–257 (1948) (Summary procedures "present a treacherous record for deciding issues of far-flung import.").

If courts can exert this type of control over local government, without so much as a factual hearing, what are governors, mayors and councilmen to reckon their job is? Is anything left for them? Are they merely functionaries whose sole purpose is to carry out the policies set by lower courts in response to political lawsuits?

Equally important, if we ignore local sovereignty in this way, what type of message will we be sending to lower court judges? How important are they? How much power should they really have?

Remember, not every decision they make can be reviewed by a circuit court, and not every circuit court case can be reviewed by this Court.

Review will not take place, for example, where a skillful lower court judge (especially if he is allowed to rule without a trial and without a jury) exerts powerful influence over *settlements* in these political suits. Such *settlements* will not be reviewed by ANYBODY – EVER. Is that what we really want for these political cases?

We should avoid this. One way would be to send this case back to the lower court for a complete trial on the issues. That is the least we can do. Doing much more would still be prudent; doing less would be very unwise.

III. THE BOARD OF ESTIMATE WAS LAWFULLY CONSTITUTED, REPEATEDLY APPROVED BY THE VOTERS AND IS CONSISTENT WITH THE PRECEDENTS AND POLICIES ENUNCIATED BY THIS COURT.

In 1898, New York City was consolidated by the elected officials of the five boroughs and the state legislature

pursuant to the laws of New York State. 1897 N.Y. Laws ch. 378, § 1. The Board of Estimate was created pursuant to state law when, in 1901, the New York State Legislature revised the City Charter. 1901 N.Y. Laws ch. 466, § 226. Subsequently, through a number of referenda voted on by New Yorkers and through changes made by elected leaders, the Board of Estimate came to its present character. *See* Kramarsky, *The Structure Powers and Functions of New York City's Board of Estimate*, 1–15 (1973).

Therefore, for over 90 years the Board of Estimate has been created and shaped by the people and their elected representatives. If the concept of representative democracy has importance those factors should be given weight by this Honorable Court.

* * *

New York City and New York State law provide for democratic methods to reconstitute the Board. These include referenda to change apportionment directly or through a charter amendment approved by the voters, N.Y. Mun. Home Rule Law §§ 24(2) (J) and 37 (1), (2) (respectively) (McKinney's 1969 & Supp. 1988); convincing the mayor to set up a charter revision commission, N.Y. Mun. Home Rule Law § 36(4) (McKinney's 1969); or persuading the State Legislature to amend the City Charter. N.Y. Const. art. IX, § 2. The three nominal plaintiffs never attempted any of these.

Amicus finds it bizarre and ironic that, in the absence of any expression of disfavor from the voters and in the face of charter revisions authorized by the State Legislature and Mayor, and approved by City voters, and with the various democratic means available for reconstituting the Board, plaintiffs ran into federal court asking a judge to strike

down the Board of Estimate in the name of DEMOCRACY. This is *not* democratic.

Nevertheless, *amicus* recognizes that even in a representative democracy, majority rule is not the only goal of a just society. Protecting minorities from discrimination, for example, is highly important. A finding of invidious discrimination proved decisive in the seminal one person, one vote cases of *Baker v. Carr*, 369 U.S. 186, 244–245 (Douglas, J., concurring) and 253–255, 258–259 (Clark, J., concurring) (1962), and *Reynolds v. Sims*, 377 U.S. 533, 561–568 (1964).

In this case, however, the nominal plaintiffs make *no* charge of invidious discrimination.

Another key aspect of *Baker v. Carr* and *Reynolds v. Sims* was that in the states affected (Tennessee and Alabama) a *minority* of the voters could control reapportionment decisions. *See, e.g., Baker*, 369 U.S. at 193; *Reynolds*, 377 U.S. at 553–554. In New York, however, we have *majority* rule on the issue of reapportionment.

Thus, striking down the Board of Estimate would fail to address the two major reasons for the one person, one vote doctrine – discrimination and minority rule.

* * *

In the past, this Court has shown its wisdom by stating that viable local governments may need great flexibility in municipal arrangements to meet changing urban conditions and societal needs. *Sailors v. Board of Education*, 387 U.S. 105, 110–111 (1967); *Abate v. Mundt*, 403 U.S. 182, 185 (1971). The Court has also said that "mathematical exactness or precision is hardly a workable constitutional requirement," *Abate*, 403 U.S. at 185; *Reynolds*, 377 U.S. at

577; and that "[T]he science of government is the most abstruse of all sciences.... It is the science of experiment." *Sailors*, 387 U.S. at 109 (quoting *Anderson v. Dunn*, 6 Wheat 204, 226 (1821)). Equally instructive is this Court's rule that the Constitution does not require a straitjacket in devising local government suitable for local needs and efficient in solving local problems, *Avery v. Midland County*, 390 U.S. 474, 485 (1968); and most of all that "the Constitution and this Court are not roadblocks in the path of innovation, experiment and development among units of local government." *Id.*

If ever there was a case where these rules should be followed, this is it. Here, accepting the plaintiffs' argument *would* roadblock innovation and local government development. It *would* result in a straitjacket. It would *not* represent flexible, responsive and democratic governing.

IV. THE LOWER COURTS SHOULD HAVE TAKEN THE THREE AT-LARGE BOARD MEMBERS INTO ACCOUNT.

It is important to remember that the Board of Estimate has three at–large members elected citywide (the Mayor, Comptroller and City Council President). They each have two votes (a total of six). Combined they can outvote the five borough presidents who have one vote each. The lower courts here refused to consider the effect of this arrangement on one person, one vote theory. Instead, they cited a number of cases in which at–large membership was found unconstitutional.

Four features distinguish the Board from those elective bodies cited. First, the Board of Estimate contains citywide elected officials with duties independent of the Board. Second, as mentioned, these officials dilute the power of and can outvote the borough presidents. Third, the Board shares its legislative powers with a proportionally elected City

Council. Fourth, in addition to the Board's legislative powers, it has administrative duties, helping to run a city of over 7,000,000, the most populous in the United States. Thus, when the District Court and Second Circuit looked to cases treating towns, medium–sized cities and a Carribean territory, all with unicameral legislatures, they looked to cases with facts so dissimilar to New York City and the Board of Estimate as to be almost irrelevant. *See Morris v. Board of Estimate*, 592 F. Supp. 1462, 1468 (E.D.N.Y. 1984); *Morris v. Board of Estimate*, 831 F.2d 384, 388–389 (2d Cir. 1987).

This was wrong. It illustrates the "straitjacket" and undemocratic outlooks of the lower courts. It harms self–government which is the foundation of our continuing democracy.

CONCLUSION

Cogent reasons exist for reversing this case entirely. Alternatively and at the very least, the case should be remanded to the District Court for a full trial and a factual finding of whether the three at–large Board members balance the perceived deviation from the one person, one vote theory.

Respectfully Submitted,

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